



GENERAL SERVICES ADMINISTRATION

48 CFR Parts 511, 538, and 552

[GSAR Case 2010-G511; Docket 2014-0008; Sequence 1]

RIN 3090-AJ43

**General Services Administration Acquisition Regulation
(GSAR); Purchasing by Non-Federal Entities**

AGENCY: Office of Acquisition Policy, General Services Administration.

ACTION: Proposed rule with request for comments.

SUMMARY: The General Services Administration (GSA) is issuing a proposed rule amending the General Services Administration Acquisition Regulation (GSAR), Describing Agency Needs, to implement the Federal Supply Schedules Usage Act of 2010 (FSSUA), the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (NAHASDA), the John Warner National Defense Authorization Act for Fiscal Year 2007 (NDAA), and the Local Preparedness Acquisition Act for Fiscal Year 2008 (LPAA), to provide increased access to GSA's Federal Supply Schedules (Schedules). GSA is also amending GSAR regarding Federal Supply Schedule Contracting and Solicitation Provisions and Contract Clauses, in regard to this statutory implementation.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before **[Insert date 60**

days after date of publication in the Federal Register to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2010-G511, Purchasing by Non-Federal Entities, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments by searching for "GSAR Case 2010-G511". Select the link "Comment Now" and follow the instructions provided at the "You are commenting on" screen. Please include your name, company name (if any), and "GSAR Case 2010-G511", on your attached document.

- Fax: 202-501-4067.
- Mail: U.S. General Services Administration,
Regulatory Secretariat Division (MVCB), 1800 F Street,
NW, 2nd Floor, ATTN: Hada Flowers, Washington, DC
20405-0001.

Instructions: Please submit comments only and cite GSAR Case 2010-G511 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Munson, General Services Acquisition Policy Division, GSA, 202-357-9652 or email Dana.Munson@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite GSAR Case 2010-G511.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Supply Schedules Program, which is operated by GSA, is designed to provide Federal agencies with a simplified process of acquiring commonly used commercial supplies and services at prices associated with volume buying. Ordering activities conduct streamlined competitions among a number of Schedule contractors, issue orders directly to the selected contractor, and administer orders.

GSA is issuing a proposed rule amending Parts 511, 538, and 552 of the GSAR to implement a number of statutory provisions to provide increased access to GSA's Schedules to the American National Red Cross, other qualified organizations, which includes National Voluntary Organizations Active in Disaster (NVOAD), and state or local governments, pursuant to the FSSUA (Pub. L. 111-263).

Specifically, section 2 of the FSSUA added subsection 40 U.S.C. 502(e), authorizing the use of the Schedules by the American National Red Cross and other qualified organizations in certain circumstances.

Further, section 3 of the FSSUA added subsection 40 U.S.C. 502(f), which requires all users of the Schedules, including non-Federal users, to use the contracts in accordance with the ordering guidance provided by the Administrator of the General Services. GSA encourages non-Federal users to follow the Schedules ordering procedures set forth in the Federal Acquisition Regulation (FAR) 8.4; however, non-Federal users may use different established competitive ordering procedures if such procedures are needed to satisfy their state or local acquisition regulations and/or organizational policies.

Finally, section 4 of the FSSUA further amended 40 U.S.C. 502 to include additional purchasing authority for state or local governments by inserting "to facilitate disaster preparedness or response, " after "Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121, et seq.) " in 40 U.S.C. 502(d)(1).

FSSUA provides for the following:

- The Administrator may provide for the use of the Schedules by the American National Red Cross. Purchases by

the American National Red Cross under authority derived from the FSSUA shall be used in furtherance of the purposes of American National Red Cross as set forth in 36 U.S.C. 300102. The authority under FSSUA may not be used to purchase supplies for resale.

- The Administrator may provide for the use of Schedules by other qualified organizations, to include NVOADs. Purchases under this authority by other qualified organizations shall be used in furtherance of purposes determined to be appropriate to facilitate emergency preparedness and disaster relief and set forth in guidance by the Administrator of General Services, in consultation with the Administrator of the Federal Emergency Management Agency. This authority may not be used to purchase supplies for resale. The term "qualified organization" means a relief or disaster assistance organization as described in section 309 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5152).

- State or local governments are authorized to use Schedules for certain goods and services to be used to facilitate disaster preparedness or response. FSSUA expands upon the authority granted under Section 833 of the NDAA, which allows state or local governments to use GSA's Schedules to recover from a disaster or attack.

As a result of the above authorities, GSA is adding the following definitions to GSAR 538.7001:

- "Preparedness" means actions that may include, but are not limited to planning, resourcing, training, exercising, and organizing to build, sustain, and improve operational disaster response capabilities. Preparedness also includes the process of identifying the personnel, training, and equipment needed for a wide range of potential incidents, and developing jurisdiction-specific plans for delivering capabilities when needed for an incident.

- "Response" means immediate actions taken during a disaster, or in its immediate aftermath, in order to save lives, protect property and the environment, and to meet basic human needs. Response also includes the execution of emergency plans and actions to support short-term recovery.

- "Recovery" means actions including, but not limited to, the development, coordination, and execution of service-and site-restoration plans; the reconstitution of Government operations and services; individual, private-sector, nongovernmental, and public-assistance programs to provide housing and to promote restoration; long-term care and treatment of affected persons; additional measures for social, political, environmental, and economic restoration;

evaluation of the incident to identify lessons learned; post-incident reporting; and development of initiatives to mitigate the effects of future incidents.

- "Relief" means disaster "response" and "recovery".

Please see full definitions for these terms.

All users of GSA's Schedules, including non-Federal users, shall use the Schedules in accordance with the ordering guidance provided by the Administrator of General Services. GSA encourages non-Federal users to follow the Schedule Ordering Procedures set forth in FAR subpart 8.4, but they may use different established competitive ordering procedures if such procedures are needed to satisfy their state and local acquisition regulations and/or organizational policies.

The authority granted under FSSUA is available for use on a voluntary (i.e., non-mandatory) basis. In other words, businesses with Schedule contracts have the option of deciding whether they will accept orders placed by state or local governments, the American National Red Cross, or other qualified organizations.

Additionally, Section 101 of NAHASDA (Pub. L. 110-411) codified at 25 U.S.C. 4111(j), provides that "each Indian tribe or tribally designated housing entity shall be considered to be an Executive agency in carrying out any program,

service, or other activity under this Act; and (2) each Indian tribe or tribally designated housing entity and each employee of the Indian tribe or tribally designated housing entity shall have access to sources of supply on the same basis as employees of an Executive agency". As such, tribes or tribally designated housing entities expending funds from block grants pursuant to NAHASDA may access GSA's sources of supply, including the Schedules, at their discretion.

Additionally, this proposed rule amends GSAR Parts 511, 538, and 552 to implement Section 833 of the NDAA. Section 833 amends 40 U.S.C. 502(d)(1) to authorize the Administrator of General Services to provide to state or local governments the use of GSA's Schedules for the purchase of goods or services to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121, et seq.) or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.

Section 833 also amends 40 U.S.C. 502(d)(2) to require the Secretary of Homeland Security to determine which goods and services qualify before the Administrator provides for the use of GSA's Schedules. House Report 109-452 of the

Committee on Armed Services indicates that section 833 (referred to in the House Report as section 823), builds on the implementation of the Cooperative Purchasing Program authorized in Section 211 of the E-Government Act of 2002, which permitted state or local governments to access GSA's information technology schedule, known as Schedule 70.

Finally, the LPAA amended 40 U.S.C. 502(c), by authorizing the Administrator of General Services to provide to state or local governments the use of GSA's Schedules for the acquisition of law enforcement, security, and certain other related items.

The non-Federal ordering activity is responsible for ensuring that only authorized representatives of its organization place orders and that goods or services ordered are used only for the purposes authorized. Existing Schedule contracts may be modified only by mutual agreement of the parties. After an existing contract has been modified, a Schedule contractor still retains the right to decline orders by non-Federal entities on a case-by-case basis. This applies to future Schedule contractors, as well. Schedule contractors may decline any order from entities outside the Executive Branch (see GSAR 552.238-78). Similarly, the rule places no obligation on non-Federal buyers to use Schedule contracts. They will have

full discretion to decide if they wish to make a Schedule purchase, subject however, to any limitations that may be established under state and local laws or organizational policies.

The Federal Government will not be liable for the performance or nonperformance of orders established under the authority of this rule between Schedule contractors and eligible non-Federal entities. Disputes that cannot be resolved by the parties to the new contract can be litigated in any court of competent jurisdiction over the parties.

The prices of supplies and services available on Schedule contracts include an industrial funding fee. The fee covers the administrative costs incurred by GSA to operate the Schedules program. The fee will be periodically adjusted as necessary to recover the cost of operating the program.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq., because implementing the authorities enumerated herein will expand or add the ability for additional qualified organizations to procure from GSA's Schedule contracts. For small businesses that hold a Schedule contract, their sales may increase for orders placed in order to prepare for a disaster.

The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

This rule is to implement the Federal Supply Schedules Usage Act of 2010, which was effective upon Presidential signature. The Act allows GSA to further expand access to Schedules for state and local governments, the American National Red Cross, and allows "other qualified organizations" access to Schedules when purchasing in support of emergency preparedness and disaster relief. Implementation of the Act will affect large and small businesses.

Prior to this Act, except for some limited exceptions, only state and local governments and the American National Red Cross

were authorized to procure from Federal Supply Schedule (FSS) contracts under specific scopes. "Other qualified organizations" were not previously authorized to procure from FSS contracts.

Under the Act, the scope of authorized users of FSS contracts was expanded to include "other qualified organizations," which is in addition to the already authorized state and local governments and the American National Red Cross (ANRC). Access to Schedules for each of these entities varies. The ANRC may access Schedules in support of their Federal charter; state and local governments may use the Schedules to prepare, respond, and recover from major disasters; and "other qualified organizations" may use the Schedules for emergency preparedness and disaster relief.

It should be noted that this is an optional program under the FSS program. This proposed rule applies to all FSS contractors that agree to sell goods and services to these eligible entities, under the appropriate scope of use. A modification will be issued outlining if a contractor wishes to sell to each of the 3 user groups, under the assigned scope. There are no additional compliance requirements for contractors than what is already required; therefore, there is no additional cost to small business if they decide to participate.

The Regulatory Secretariat has submitted a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, et seq. (GSAR Case 2010-G511), in correspondence.

IV. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

List of Subjects in 48 CFR Parts 501, 538, and 552

Government procurement.

DATED: April 11, 2014.

Jeffrey A. Koses,
Senior Procurement Executive,
Office of Acquisition Policy,
General Services Administration.

Therefore, GSA proposes to amend 48 CFR parts 511, 538, and 552 as set forth below:

1. The authority citations for 48 CFR parts 511, 538, and 552 continue to read as follows:

AUTHORITY: 40 U.S.C 121(c).

PART 511—DESCRIBING AGENCY NEEDS

2. Amend section 511.204 by revising paragraphs (b)(2) and (c) to read as follows:

511.204 Solicitation provisions and contract clauses.

* * * * *

(b) * * *

(2) The contracting officer shall include the clause at 552.211-75, Preservation, Packaging, and Packing, in solicitations and contracts for supplies expected to exceed the simplified acquisition threshold. The contracting officer may also include the clause in contracts estimated to be at or below the simplified acquisition threshold when appropriate. The contracting officer shall use Alternate I in solicitations and contracts for all Federal Supply Schedule Contracts.

* * * * *

(c) Supply contracts. The contracting officer shall include the clause at 552.211-77, Packing List, in solicitations and contracts for supplies, including

purchases over the micropurchase threshold. Use Alternate I in solicitations and contracts for all Federal Supply Schedule Contracts.

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

3. Amend section 538.273 by revising paragraphs (a)(2) and (b)(2) to read as follows:

538.273 Contract clauses.

(a) * * *

(2) 552.238-71, Submission and Distribution of Authorized FSS Schedule Pricelists. Use Alternate I, in solicitations and contracts for all Federal Supply Schedule contracts.

(b) * * *

(2) 552.238-75, Price Reductions. Use Alternate I in solicitations and contracts for all Federal Supply Schedule contracts.

4. Revise the heading of subpart 538.70 to read as follows:

Subpart 538.70—Purchasing by Non-Federal Entities

5. Amend section 538.7000 by adding paragraph (d) to read as follows:

538.7000 Scope of subpart.

* * * * *

(d) Other Federal Supply Schedules as outlined in

this subpart.

6. Amend section 538.7001 by adding, in alphabetical order, the definitions for "Preparedness", "Recovery", "Relief", and "Response" to read as follows:

538.7001 Definitions.

* * * * *

Preparedness means actions that may include, but are not limited to planning, resourcing, training, exercising, and organizing to build, sustain, and improve operational disaster response capabilities. Preparedness also includes the process of identifying the personnel, training, and equipment needed for a wide range of potential incidents, and developing jurisdiction-specific plans for delivering capabilities when needed for an incident.

Recovery means actions including, but not limited to, the development, coordination, and execution of service- and site-restoration plans; the reconstitution of Government operations and services; individual, private-sector, nongovernmental, and public-assistance programs to provide housing and to promote restoration; long-term care and treatment of affected persons; additional measures for social, political, environmental, and economic restoration; evaluation of the incident to identify lessons learned; post-incident reporting; and development of initiatives to

mitigate the effects of future incidents.

Relief means disaster "response" and "recovery".

Please see full definitions for these terms.

Response means immediate actions taken during a disaster, or in its immediate aftermath, in order to save lives, protect property and the environment, and meet basic human needs. Response also includes the execution of emergency plans and actions to support short-term recovery.

* * * * *

7. Amend section 538.7002 by revising paragraph (d); and adding paragraphs (e) through (g) to read as follows:

538.7002 General.

* * * * *

(d) Pub. L. 109-364, the John Warner National Defense Authorization Act for Fiscal Year 2007 authorizing state and local governments, to use Federal Supply Schedule contracts to purchase products and services to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) or to facilitate for recovery from terrorism or nuclear, biological, chemical, or radiological attack. Pub. L. 111-263, the Federal Supply Schedules Usage Act of 2010 authorizing state and local governments to use Federal

Supply Schedule contracts to purchase products and services to be used to facilitate disaster preparedness or response.

(e) Pub. L. 111-263, the Federal Supply Schedules Usage Act of 2010, authorizes the American National Red Cross to use Federal Supply Schedule contracts to purchase goods or services to be used in furtherance of its purposes as set forth in its federal charter (36 U.S.C. 300102).

(f) Pub. L. 111-263, the Federal Supply Schedules Usage Act of 2010, authorizes other qualified organizations to use Federal Supply Schedule contracts to purchase products and services in furtherance of purposes determined to be appropriate to facilitate emergency preparedness and disaster relief and set forth in guidance by the Administrator of General Services, in consultation with the Administrator of the Federal Emergency Management Agency. Other qualified organizations must meet the requirements of 42 U.S.C. 5152.

(g) A listing of the participating contractors and SINS for the goods and services that are available under these authorized Federal Supply Schedules, is available in GSA's e-Library at www.gsa.gov/elibrary.

8. Amend section 538.7003 by revising the introductory text to read as follows:

538.7003 Policy.

Preparing solicitations when schedules are open to eligible non-federal entities. When opening authorized Federal Supply Schedules for use by eligible non-federal entities, the contracting officer must make minor modifications to certain Federal Acquisition Regulation and GSAM provisions and clauses in order to make clear distinctions between the rights and responsibilities of the U.S. Government in its management and regulatory capacity pursuant to which it awards schedule contracts and fulfills associated Federal requirements versus the rights and responsibilities of eligible ordering activities placing orders to fulfill agency needs. Accordingly, the contracting officer is authorized to modify the following FAR provisions/clauses to delete "Government" or similar language referring to the U.S. Government and substitute "ordering activity" or similar language when preparing solicitations and contracts to be awarded under authorized Federal Supply Schedules. When such changes are made, the word "(DEVIATION)" shall be added at the end of the title of the provision or clause. These clauses include but are not limited to:

* * * * *

9. Revise section 538.7004 to read as follows:

538.7004 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.238-77, Definition (Federal Supply Schedules), in solicitations and contracts for all Federal Supply Schedules.

(b) The contracting officer shall insert the clause at 552.238-78, Scope of Contract (Eligible Ordering Activities), in solicitations and contracts for all Federal Supply Schedules.

(c) The contracting officer shall insert the clause at 552.238-79, Use of Federal Supply Schedule Contracts by Non-Federal Entities, in solicitations and contracts for all Federal Supply Schedules.

(d) See 552.101-70 for authorized FAR deviations.

Subpart 538.71 [Removed and Reserved]

10. Remove and reserve subpart 538.71.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Revise section 552.238-76 to read as follows:

552.238-76 Definition (Federal Supply Schedules)—Non-Federal Entity Purchasing.

As prescribed in 538.7104(a), insert the following clause:

DEFINITION (FEDERAL SUPPLY SCHEDULES)—NON-FEDERAL ENTITY
PURCHASING (**DATE**)

Ordering activity (also called "ordering agency" and "ordering office") means an eligible ordering activity (see (552.238-78, authorized to place orders under Federal Supply Schedule contracts.

(End of clause)

12. Amend section 552.238-78 by—

- a. Revising the clause heading;
- b. Redesignating paragraphs (a)(7) and (8) as paragraphs (a)(8) and (9), respectively;
- c. Adding a new paragraph (a)(7);
- d. Revising paragraph (d);
- e. Adding paragraph (h); and
- f. Removing Alternate I.

The revised and added text reads as follows:

552.238-78 Scope of Contract (Eligible Ordering Activities).

* * * * *

SCOPE OF CONTRACT (ELIGIBLE ORDERING ACTIVITIES) (DATE)

(a) * * *

(7) Tribes or tribally designated housing entities pursuant to 25 U.S.C. 4111(j);

* * * * *

(d) The following activities may place orders against Schedule contracts:

(1) State and local government may place orders against Schedule 70 contracts, and Consolidated Schedule contracts containing information technology Special Item Numbers, and Schedule 84 contracts, on an optional basis; PROVIDED, the Contractor accepts order(s) from such activities;

(2) The American National Red Cross may place orders against Federal Supply Schedules for products and services in furtherance of the purposes set forth in its

Federal charter (36 U.S.C. 300102); PROVIDED, the Contractor accepts order(s) from the American National Red Cross; and

(3) Other qualified organizations, as defined in section 309 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5152), may place orders against Federal Supply Schedules for products and services determined to be appropriate to facilitate emergency preparedness and disaster relief and set forth in guidance by the Administrator of General Services, in consultation with the Administrator of the Federal Emergency Management Agency; PROVIDED, the Contractor accepts order(s) from such activities.

(4) State and local governments may place orders against Federal Supply Schedules for goods or services determined by the Secretary of Homeland Security to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121, et seq.) to facilitate disaster preparedness or response, or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack; PROVIDED, the Contractor accepts order(s) from such activities.

* * * * *

(h) All users of GSA's Federal Supply Schedules, including non-Federal users, shall use the schedules in accordance with the ordering guidance provided by the Administrator of General Services. GSA encourages non-Federal users to follow the Schedule Ordering Procedures set forth in the Federal Acquisition Regulation (FAR) 8.4, but they may use different established competitive ordering procedures if such procedures are needed to satisfy their state and local acquisition regulations and/or organizational policies.

(End of clause)

13. Amend section 552.238-79 by—

- a. Revising the section heading;
- b. Revising the introductory text; and

c. Revising the clause heading.

The revised text reads as follows:

**552.238-79 Use of Federal Supply Schedule Contracts by
Non-Federal Entities**

As prescribed in 538.7004(c) and 538.7104(c), insert
the following clause:

USE OF FEDERAL SUPPLY SCHEDULE CONTRACTS BY NON-FEDERAL ENTITIES (**DATE**)

* * * * *

538.238-80 [Removed and Reserved]

14. Remove and reserve section 552.238-80.

[Billing Code: 6820-61]

[FR Doc. 2014-08648 Filed 04/16/2014 at 8:45 am;
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